QUESTION PRESENTED

1. Whether the Court must establish the parameters of minimum military due process in light of *Solorio v. United States*, which greatly expanded criminal court-martial jurisdiction.

2. Whether petitioner was denied his rights under the fifth and sixth amendments of the constitution to a trial by an impartial jury and to due process of law, in that the court-martial which convicted him of two specifications of murder and two specifications of assault with a dangerous weapon consisted of only five members.

3. Whether the cumulative impact of juror misconduct, improper judicial instructions, illegal command influence and the inherently suspect deliberations of a five-member jury operated to deny petitioner's fifth and sixth amendment rights to due process of law and to a fundamentally fair trial by an impartial jury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

MILTON E. HARGROVE
SPECIALIST FIVE, UNITED STATES ARMY, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Milton E. Hargrove, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The judgment of the Court of Military Appeals was entered against petitioner on September 25, 1987, with Chief Judge Everett dissenting, and is reported at 25 M.J. 68 (C.M.A. 1987) (Appendix A). The opinion of the Army Court of Military Review is unreported, CM 443107 (A.C.M.R. 27 Dec. 1984) (unpub.) (Appendix B). A petition for reconsideration was denied on April 1, 1988, with Chief Judge Everett again dissenting (Appendix C). A petition for further reconsideration out of time was denied on May 24, 1988 (Appendix D).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. 1259 (Supp. IV 1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: No person . . . shall be deprived of liberty or property, without due process of law.
>
> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury.

The Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 801 *et seq.* (1976) provides:

> Article 16: The three kinds of court-martial in each of the armed forces are – (1) general courts-martial, consisting of (A) a military judge and not less than five members.
>
> Article 52(a)(2): No person may be convicted of any other offense, except as provided in section 845(b) of this title (Article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
>
> Article 52(b)(2): No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

STATEMENT OF THE CASE

After *voir dire* and challenges of court members, the panel in petitioner's court-martial consisted of only five members. These five members heard overwhelming evidence that petititoner is a severe paranoid schizophrenic and was legally insane at the time of the offenses. The government's primary witness on the issue of sanity had previously joined with seven other psychiatrists, including government psychiatrists, in concluding petitioner was insane at the time of the offenses. This crucial witness admitted on cross-examination that he had changed his opinion after discussing the government sanity board findings with the commanding general who convened the court-martial. This same general officer was also the senior supervisor of the witness. The military judge gave confusing, improper and incomplete instructions on findings. After trial, one of the five members admitted that he had personally conducted an extensive ex-

periment to determine the actual mechanics by which the alleged offenses had occurred. Contrary to his pleas, petitioner was found guilty by two-thirds of the court members of two specifications of unpremeditated murder and two specifications of assault with a dangerous weapon in violation of Articles 118 and 128, UCMJ, 10 U.S.C. §§ 918 and 928, respectively. Petitioner was sentenced to a dishonorable discharge, confinement at hard labor for 20 years and reduction to the rank of Private E-1. The covening authority approved the sentence pursuant to Article 60, UCMJ, 10 U.S.C. § 860. The issues presented, *inter alia*, to the Court of Military Appeals, as a prerequisite to this Court's jurisdiction were as follows:

> WHETHER THE EVIDENCE OF RECORD FAILS TO ESTABLISH, BEYOND A REASONABLE DOUBT, THAT THE APPELLANT WAS SANE AT THE TIME OF THE OFFENSES.
>
> WHETHER, TO THE APPELLANT'S PREJUDICE, THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE COURT MEMBERS REGARDING CRITICAL ASPECTS OF THE LAW.
>
> WHETHER AS THE RESULT OF THE IMPROPER ACTIONS OF ONE OF THE PANEL MEMBERS IN INDEPENDENTLY INVESTIGATING THE CIRCUMSTANCES SURROUNDING THE OFFENSES, THE FINDINGS OF GUILTY WERE BASED UPON MATTERS NOT ADMITTED INTO EVIDENCE AT APPELLANT'S TRIAL.
>
> WHETHER THE APPELLANT WAS DENIED HIS RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES TO A TRIAL BY AN IMPARTIAL JURY AND DUE PROCESS OF LAW, IN THAT THE COURT-MARTIAL WHICH CONVICTED HIM CONSISTED OF LESS THAN SIX MEMBERS.
>
> WHETHER THE MILITARY JUDGE'S FAILURE TO INSTRUCT ON VOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE OF UNPREMEDITATED MURDER (SPECIFICATION 3 AND 4 OF CHARGE I) WAS PREJUDICIAL ERROR. *SEE UNITED STATES v. WILSON*, 26 M.J. 10 (CMA 1988).

STATEMENT OF FACTS

Petitioner reported to his unit at Friedberg, Federal Republic of Germany on July 28, 1980. Prior to that, he had successfully completed over five years of active duty service (Defense Exhibits G, H). At his prior assignment, he distinguished himself in the performance of his duties as a tank commander (R. 1461; Defense Exhibit E). His former company commander, first sergeant, and platoon sergeant testified that petitioner took pride in his appearance (R. 1474, 1481), got along well with the other noncommissioned officers, and communicated well with his subordinates (R. 1467, 1473). He was an above-average soldier who showed initiative (R. 1481), was dependable (R. 1481), and got the job done (R. 1471, 1473, 1480).

Within a week of reporting to his unit in Germany, petitioner begin to exhibit bizarre behavior. On August 2, 1980, petitioner was in the town of Bad Nauheim. For no apparent reason he struck a retired German laborer from behind. The victim had been walking down the street with another elderly man speaking in German about cherry plantations (R. 1904-1905). Petitioner's "explanation" of the incident was that although he understood no German, he felt the two men were talking about him (Defense Exhibit Y).

A second unprovoked attack by the petitioner occurred on August 2, 1980. He and one of his roommates, Staff Sergeant Ferry, were discussing certain personal matters. Staff Sergeant Ferry, thinking everything had been resolved, was walking away when petitioner struck him from behind for no reason (R. 2372-2374). During petitioner's two years at Fort Riley immediately preceding his assignment to Germany, he had never exhibited any tendency toward the violent behavior manifested in these two inexplicable acts (R. 1467, 1481).

There were other indications at that time that petitioner was delusional. On at least two occasions in early August 1980, petitioner missed formation because he thought the day

in question was Sunday. Although such an error is certainly possible, in petitioner's case no amount of persuasion by his superior noncommissioned officer succeeded in convincing petitioner that he was supposed to be at work (R. 1555, 1563). On other occasions, he appeared in uniform awaiting formation when it was in fact Saturday or Sunday (R. 1556). These instances first occurred in early August, but at least one occurred toward the end of September (R. 1737-1738).

Petitioner showed other signs of mental disturbance. He appeared to be hearing voices. His roommates reported that while resting on his bed in a quiet room, he would suddenly jump up and ask who was calling his name (R. 1574, 1612, 1615), or he would go into the hallway and say, "stop yelling at me." There were a number of reports that he would inappropriately interject, "I'm not a punk, I'm not a faggot" (R. 1560, 1615, 1736). One of these instances occurred during a training class on first aid, where petitioner raised his hand and said, "I am not a punk or a faggot. You all set me up. You are all out to get me. Today is Thursday" (R. 1186, 1667). According to the class instructor, there was no apparent reason for this outburst, nor was it Thursday when the described incident occurred (R. 1688).

Petitioner also created a disturbance in a Headstart[1] class which caused him to be dropped from the program (R.1561). Additionally, he was reported to mumble to himself and be oblivious to his surroundings and to the presence of others (R. 1615-1616). This inappropriate behavior was brought to the attention of his company commander, Captain Humphrey, who attempted to counsel petitioner. Captain Humphrey found petitioner peculiarly unresponsive. The captain had never before seen a soldier utterly fail to react to what was being said to him (R. 1562). Based on his dealings with petitioner and numerous reports he had concerning petitioner's

---

[1] Headstart is a program to introduce newly assigned soldiers to life in Germany.

bizarre conduct, Captain Humphrey referred petitioner for an evaluation at the Mental Hygiene Clinic (Defense Exhibit X).

Pursuant to that referral, Staff Sergeant Robert Hastings interviewed petitioner. Petitioner started the interview with, "I'm not a punk or a faggot. I've never been one and I don't want to be." Petitioner complained that people had been calling him names. He admitted to having become involved in two fights without provocation since arriving in the unit, but he did not know what prompted his actions (Defense Exhibit LL). Petitioner's demeanor during the interview was extremely guarded (R. 1771); his stance and movements were rigid (R. 1770).

Petitioner was also interviewed on August 8, 1980, by Dr. Pather at the Mental Hygiene Clinic. Although petitioner did appear normal in this interview, Dr. Pather's impression was that petitioner's behavior suggested a borderline syndrome in which petitioner went in and out of psychotic episodes (Defense Exhibit LL). Dr. Pather referred the case to a psychiatrist, who suggested that the "situation be monitored" by petitioner's chain of command because of "his potential for performing in paranoid schizophrenia" (R. 1803). Regrettably, the only message perceived by Lieutenant Lind, petitioner's platoon leader who escorted petitioner to the appointment, was that petitioner was experiencing disorientation problems (R. 1607) and should be returned to the clinic if there were any further disturbances (R. 1610). Lieutenant Lind denied being told that petitioner might be psychotic (R. 1609).

Although there were no further instances of violent behavior during the following three months, petitioner continued to conduct himself inappropriately. He continued to mumble to himself about not being a punk or faggot (R. 1616, 1736). He continued to get up during the night, awakened by imaginary voices and knocking (R. 1615). He would refuse to respond to people, acting as if the person addressing him was not there (R. 1615, 1659, 1701). Fellow soldiers described

how he would appear to be in a daze, staring off into space and laughing occasionally for no apparent reason (R. 1590, 1616, 1699). As the result of petitioner's bizarre behavior, his roommate asked for a new room assignment.

Petitioner's actions and comments revealed that he was irrationally suspicious of the people around him. If someone were to approach him from behind, he would react fearfully and accuse the individual of "sneaking up" on him (R. 1658). He angrily accused the mail clerk of intentionally overlooking a letter to him (R. 1187, 1673). He thought the command was actively frustrating his efforts to have his family join him (R. 1187). While receiving nonjudicial punishment for striking the German in late September, petitioner told his company commander that the people in the battalion and the brigade and even the Germans were out to get him (R. 1588).

This type of behavior persisted throughout the time petitioner was in Germany (R. 1700). His company commander did not think petitioner was normal and told his successor in command of his concerns about petitioner (R. 1505). Sometime after September 22, 1980, Staff Sergeant Abell, petitioner's platoon sergeant, strongly urged that petitioner be re-evaluated for mental disturbances (R. 1591). Staff Sergeant Abell confirmed that petitioner's bizarre behavior was continuing, describing how he found petitioner, "talking, saying things, just sitting around looking, staring into space" (R. 1590). The First Sergeant took this information seriously enough to pass it on to the company commander. Sergeant Abell and other noncommissioned officers registered serious concern about petitioner pulling guard duty and going to the field (R. 1680, 1190). Despite these warnings, no steps were taken to send petitioner for a follow-up evaluation. Petitioner then accompanied his unit on the field exercise at Hohenfels which ultimately ended with the tragic tank explosion less than a week after Staff Sergeant Abell's prophetic warning.

During the course of the field exercise, petitioner's conduct was inappropriate, particularly for a soldier with his background and experience. On November 4th, Staff

Sergeant Abell became so anxious about petitioner's behavior and frustrated with petitioner's failure to respond to directions that petitioner was not allowed to draw his weapon with the rest of the tank drivers.

Petitioner exhibited other significant symptoms of being detached from reality throughout November 4th. He, alone, stood physically apart from others who were grouped closely together for warmth at a safety briefing on the evening of November 4th. Although it was a freezing cold night (R. 1163), he disobeyed his superior commissioned and noncommissioned officers by adamantly refusing to enter a heated vehicle for the night (R. 1021, 1218-1219). Having been told by his tank commander, assistant platoon sergeant, and the commander to find a heated place, appellant insisted upon locking himself in his unheated vehicle, Tank A-35, which was lined up next to Tank A-33. Finally, just prior to the explosion, petitioner banged on the hatch of Tank A-33 awakening two of the occupants, one of whom was his friend (R. 1180). Petitioner then said something that did not make any sense and left (R. 1170). Shortly thereafter, Tank A-33 exploded, the apparent result of an artillery round being fired from Tank A-35's main gun.

Following the explosion, petitioner appeared completely oblivious to the horror and chaos that surrounded him. He did not respond when Lieutenant Masters, having just rescued two of the four occupants from the burning tank, asked him to get a flashlight (R. 1219-1221). Petitioner stood calmly by and smoked a cigarette (R. 1669). He was also observed sitting on the ground eating "C rations" while one of the victims could still be heard screaming (R. 1694-1695).

REASONS FOR GRANTING THE WRIT

A. *Consideration by the Court of petitioner's claim that military due process requires a unanimous verdict of at least six members is necessary in light of the Court's decision in Solorio v. United States.*

Petitioner has been convicted, *inter alia*, of two specifications of murder and sentenced to spend twenty years of his life in confinement by a process which has been deemed in-

herently suspect and constitutionally infirm for every jurisdiction in the United States, save one. This Court has held that a five-member jury is unconstitutional *per se* and that findings of a six-member panel must be unanimous. Despite overwhelming evidence presented at trial that petitioner was insane at the time of the offenses,[2] the nonunanimous[3] five-member court-martial nonetheless convicted petitioner. The Due Process Clause requires a unanimous verdict of a six-member fact-finding body in any non-petty criminal prosecution. In *Burch v. Louisiana*, 441 U.S. 130 (1979), the Court held that a less than unanimous verdict from a six-member jury was unfair and unconstitutional. *Citing Ballew v. Georgia*, 435 U.S. 223 (1978) (five-member jury is unconstitutional *per se*). In *Ballew*, the Court stressed that at "some point, [the] decline in jury size leads to

---

[2] Seven psychiatrists, including government psychiatrists, testified at trial that petitioner suffered severe paranoid schizophrenia. At a post-trial hearing to authorize the involuntary transfer of petitioner to a psychiatric hospital, a military judge judicially found the same fact (Appendix E).

[3] Article 52(a), UCMJ, requires that the members of a court-martial vote on findings by secret written ballot. Article 52(a)(2), UCMJ, requires that two-thirds of the members concur in order to render a guilty verdict. *See also* Manual for Courts-Martial, United States, 1984 (*MCM, 1984*), Rule for Court-Martial (R.C.M.) 921. Polling the court-martial members is generally prohibited. R.C.M. 922(e), *MCM, 1984*. As a result, petitioner was denied the opportunity to ascertain the numerical composition of the verdict on findings. These provisions in effect insulate Article 52(a)(2), UCMJ, from due process scrutiny. Petitioner submits that such provisions were never intended to permit this result. Rather, they were intended to shield the court-martial members from unlawful command influence. *See* Hearings on H.R. 2498 before a Subcommittee of the Committee on Armed Services, 81st Cong. 1st Sess. (1949); War Department Advisory Committee on Military Justice, 6-7 (1946) (committee concluded that it was necessary to limit commander's influence of courts-martial members). Legislation designed to prevent unlawful command control should not now be allowed to deny petitioner a fair opportunity to litigate a question of fundamental due process. This Court should presume that petitioner's verdict was less than unanimous and that petitioner suffered prejudice. *Cf. Mendrano v.*

inaccurate fact-finding and the incorrect application of the common sense of the community to the facts." *Ballew*, 435 U.S. at 232. Accordingly convictions, where unanimity is not required of fact-finding bodies composed of six or fewer members, are unfair and violate due process. In *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985), the Court reasoned, "[t]he State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." The same compelling interest in ensuring accurate findings of fact applies to the parties in a court-martial.

Courts-martial have not been subject to the jury trial demands of the Constitution. *United States v. McClain*, 22 M.J. 124, 128 (CMA 1986). The Due Process Clause nevertheless requires that criminal trial procedures foster accurate fact-finding and fundamental fairness. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). Military members accused of crimes and the Government of the United States share a compelling interest in the accurate disposition of criminal charges. *Cf. Ake v. Oklahoma*, 470 U.S. at 79.

To facilitate fact-finding at general courts-martial, Congress has provided that such courts, designed to dispose of non-petty offenses, consist of "not less than five members." Art. 16(1)(A), UCMJ, 10 U.S.C. § 816(1)(A). In a noncapital case, only two-thirds of such members need concur in a finding of guilty. Art. 52(a)(2), UCMJ, 10 U.S.C. § 852(a)(2). The Congressional and Presidential procedures for findings and sentence at courts-martial recognize, at least for imposition of the death penalty, the well-established due process concept

---

Smith, 797 F.2d 1538, 1540 n.1 (10th Cir. 1986) ("Since, as required by the Uniform Code of Military Justice the court-martial voted by secret ballot, our record does not reveal the number of votes for conviction. However, we consider the two-thirds rule's validity because it did apply to this trial and assume only two-thirds, or four members of the court-martial voted for conviction").

that the procedural protection afforded depends to a large extent upon the interests at stake.[4] They fail to acknowledge, however, the compelling interest of both petitioner and the United States that no accused, including petitioner, be found guilty of an infamous crime and be deprived of his liberty on the basis of unreliable findings. Thus, the deliberative process of petitioner's court-martial must be scrutinized under the test adopted to resolve criminal due process concerns. The test balances three factors.

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ake v. Oklahoma, 470 U.S. at 77. Petitioner's private interest in the accuracy of the findings at trial, which placed his life and liberty at risk, is "uniquely compelling." *Ake v. Oklahoma,* 470 U.S. at 78. Such an interest weighs heavily in the balancing analysis. To weigh the second and third factors, it must be determined what additional or substitute procedural safeguards the petitioner seeks.

Petitioner seeks the protection of a reliable, deliberative fact-finding body of jurors. A fact-finding body of only five persons, whether composed of private citizens or soldiers, produces results so unreliable as a matter of law that the Due Process Clause is violated. The Court reached this conclusion in *Ballew* based upon empirical data compiled after its deci-

---

[4] Both Congress and the President have required a higher standard for findings in capital cases. When the death penalty is mandatory, the findings of "not less than five members" must be unanimous. Art. 52(a)(1), UCMJ, 10 U.S.C. § 852(a)(1). The President, acting under statutory authority, has recently provided that the non-mandatory imposition of the death penalty may be considered only after the entry of unanimous findings. R.C.M. 1004(a)(2), *MCM, 1984.* This provision became effective in February 1986. App. 21, R.C.M. 1004(a)(2), *MCM, 1984.*

sion in *Williams v. Florida*, 399 U.S. 78 (1970), upholding the use of a six-person jury. *Ballew v. Georgia*, 435 U.S. at 239. Relying on this data, the Court reached specific findings that:

> [P]rogressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding. The risk of convicting an innocent person . . . rises as the size of the jury diminishes . . . [T]he verdicts of jury deliberation in criminal cases will vary as juries become smaller, and . . . the variance amounts to an imbalance to the detriment of one side, the defense . . . [T]he presence of minority viewpoints [diminishes] as juries decrease in size. When the case is close, and the guilt or innocence of the defendant is not readily apparent [larger juries] will insure evaluation by the sense of the community and will also tend to insure accurate factfinding.

Ballew v. Georgia, 435 U.S. at 232-38. The evidence indicates that as the size of juries diminishes to five and below, the risk of conviction of innocent defendants substantially increases. Unanimity of five-person juries does not remedy the sixth amendment infirmities. A unanimous five-person jury cannot assure that the group engages in meaningful deliberation and truly represents the sense of the entire community. 435 U.S. at 241. Savings in time and money do not justify the State's interest in five-person juries. 435 U.S. at 243-44. The Court relied on the same rationale in *Burch:*

> [M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a non-petty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.

Burch v. Louisiana, 441 U.S. at 138. Once again, the Court rejected the State's justification that the use of

nonunanimous six-person juries saved time and money. 441 U.S. at 139.

The jurisdictional requirement of Article 16, UCMJ, is for "not less than five members." Nothing in that language evidences a Congressional intent that there shall be no more than five members assembled as a general court-martial. Therefore, the statute in no way prohibited the military judge, in safeguarding fundamental fairness, from ordering the detail of additional members to assure accurate fact-finding where appellant was on trial for an infamous offense.

Second, the provisions of the UCMJ do not alone define due process for courts-martial.

> We base [the rights afforded soldiers] on the laws as enacted by Congress. But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.

United States v. Clay, 1 USCMA 74, 1 CMR 74, 77 (1951). Accordingly, even though petitioner may have no sixth amendment entitlement to trial by jury,[5] the requisites of due process for civilian trials give meaningful definition to the protections to be afforded petitioner. The Due Process Clause has always applied to court-martial procedure. *Burns v. Wilson*, 346 U.S. 137, 142-43 (1953). Further, the Court of Military Appeals has adopted the requirement that a party who urges a different role than the one prevailing in the civilian community bears the burden of demonstrating that unique military conditions dictate the rule. *Courtney v. Williams*, 1 M.J. 267, 270 (CMA 1976).

---

[5] Petitioner asserts that all United States citizens are entitled to the explicit protections of the Bill of Rights, and his status as a soldier does not deprive him of the right to a jury "in all criminal prosecutions." It is clear that only the right to grand jury indictment is expressly denied to soldiers "when in actual service in time of war or public danger." U.S. Const. amend. V. An American soldier is neither an indentured servant nor a second-class citizen.

Petitioner was entitled to evaluation of the facts by that sense of the community which would tend to insure accurate fact-finding. *See Ballew v. Georgia*, 435 U.S. at 238. Unanimity of six-person juries is required to ensure that a sense of the community stands between the zealous prosecutor or biased judge. *Burch v. Louisiana*, 441 U.S. at 135-37. In the military, there is even a greater need for procedural safeguards to stand against the specter of illegal command influence, as in the case *sub judice*. Verdicts based on votes of 10-2, 9-3 and 6-0 are sufficient to serve this function. *See generally Apodoca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). Those based on votes of 4-1 or 4-2 are not. *Burch v. Louisiana*, 441 U.S. at 135-37.

The Army Court of Military Review has long considered the reasoning of this Court as enunciated in *Ballew* and *Burch* inapposite to trial by courts-martial. That court has consistently relied on the very restrictive nature of court-martial jurisdiction as set out in *O'Callahan v. Parker*, 395 U.S. 258 (1969), to remedy the constitutional infirmities of the court-martial system. *See United States v. Guilford*, 8 M.J. 598, 602 (ACMR 1979), *pet. denied*, 8 M.J. 242 (CMA 1980) and cases cited therein. This legal reasoning has been rendered fatally flawed by this Court's decision in *Solorio v. United States*, __ U.S. __, 107 S.Ct. 2924 (1978), which expressly abandons any limitations on military jurisdiction over soldiers as set out in *O'Callahan v. Parker*.[6]

While there is a compositional and functional difference between military jurors and their civilian counterparts, such does not excuse a denial of due process protections. Article 25, UCMJ, 10 U.S.C. § 825, requires convening authorities to appoint court members who are best qualified by reason of age, education, training, experience, length of service and judicial temperament. Rather than excuse nonunanimous

---

[6] Congress' decision to place military tribunals directly under Supreme Court scrutiny also evinces a congressional desire that military courts parallel civilian courts unless military necessity dictates the contrary. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

verdicts, the extraordinary composition of military juries demands that anything less than a unanimous six-member verdict be considered unreliable *per se*, since the opinion of one such "blue ribbon" military fact-finder must be given substantially *more credence* than the dissenting opinion of one civilian juror. In *Solorio*, the Court expressly declined to consider the issue of a due process claim since such had not been raised at the Court of Military Appeals. 107 S.Ct. at 2933, n. 18. Petitioner's due process claim has been properly raised before the Court of Military Appeals and offers this Court the opportunity to establish the basic parameters of minimum due process in military criminal jurisdiction.

Government interests are not adversely affected if the safeguards petitioner seeks are provided. First, the appointment of a sufficient number of members to ensure the assembly of more than five members burdens the government little in terms of time or money. The assembly of six or more members is a common occurrence in courts-martial practice. General court-martial convening authorities have sufficient members within their jurisdiction from which to appoint court-martial members. Second, the government shares the same compelling interest of all military accused in producing accurate findings. *Ake v. Oklahoma*, 470 U.S. at 79. The government has no legitimate interest in the imposition of a sentence to twenty years confinement against petitioner, who has been found guilty and sentenced to such imprisonment by inherently suspect deliberations of panel which were rendered even more unreliable by juror misconduct, illegal command influence, and improper judicial instructions.

B. *The inherently suspect and unreliable findings ignored the overwhelming evidence that petitioner suffered from paranoid schizophrenia at the time of the offense.*

At petitioner's court-martial, the defense called seven psychiatrists, including government psychiatrists, many of whom had national and international credentials (*See* Ap-

pellate Exhibits XV, XVI). On the basis of background information, psychological test results, and interviews with petitioner, each psychiatrist, without exception, came to the following conclusions:

> 1) SP5 Hargrove suffered from the mental disease of paranoid schizophrenia;
>
> 2) He was suffering from this disease at the time of the offenses; and
>
> 3) As a result of his mental disease, SP5 Hargrove was substantially impaired in his ability to conform his behavior to the requirements of law on 4 November.

(R. 1985, 1989, 2057-2059, 2122-2126, 2133, 2188-2190, 2220-2222, 2251-2252, 2254-2262, 2304-2306). These witnesses, though perhaps differing with each other on certain details, were in definite agreement that the behavior, which precipitated the first referral to the Mental Hygiene Clinic and which petitioner continued to exhibit were symptomatic of his mental illness. His deterioration from a previous level of functioning, his inappropriate mood and affect, his detachment from reality, his false beliefs of plots of persecution, his auditory hallucinations, and his fear of closeness with other males were all characteristic of his illness (R. 1981, 1986, 2001, 2008, 2011). Not only was there no evidence of malingering or faking, there but were strong indications that petitioner was trying to appear well (R. 1985, 2008, 2130, 2191). His disease, while having an adverse effect on his ability to conform his acts to the requirements of the law, would not necessarily interfere with his ability to form intent or to perform complex tasks (R. 1986, 2190, 2253, 2305). By every indication, this disease was the source of his delusion that his life was threatened and in imminent danger on the night of November 4, 1980 (R. 1981, 2228-2229, 2232-2233, 2257-2258).

In rebuttal, the government presented weak and inherently suspect evidence of petitioner's sanity through the testimony of two psychiatrists. Dr. Geiser concurred in the conclusion that petitioner suffered from paranoid schizophrenia on

November 4th (R. 2447, 2452). He also recognized that petitioner was suffering from delusions in early August and that these probably continued through November 4th (R. 2452-2453). He nevertheless concluded that petitioner could have conformed his behavior to the requirements of the law (R. 2452).

The government's only other witness on sanity was Lieutenant Colonel (LTC) Fagan. His testimony differed from the report he had initially submitted, wherein he had diagnosed petitioner's mental disease as paranoid schizophrenia (R. 2390, 2399; Appellate Exhibits IV, VII). More significantly, LTC Fagan had previously been in agreement with the other psychiatrists who testified for the defense in concluding that petitioner was *unable*, as the result of his mental disease, to conform his acts to the requirements of the law (R. 2385). He submitted a detailed, well-reasoned statement in support of that conclusion on June 9, 1981, which is remarkably consistent with the testimony subsequently given by the seven defense experts (Defense Exhibit RR). The primary reason LTC Fagan offered at trial for reversing himself was his subsequent perception that he had *erroneously* assumed that petitioner's condition as described in January 1981 ("dishevveled, severely regressed, and psychotic") had been significantly better during the early period of petitioner's incarceration (R. 2406, 2407). In support of his revised diagnosis, LTC Fagan dismissed the fact that petitioner was heard on numerous occasions to say, "I am not a punk. I am not a faggot," as being unimportant because he knew of *one* occasion when such a response might have been provoked (R. 2391). He assumed that since petitioner was not getting along with the people in the unit, some were probably taunting him in that manner (R. 2392). Not only is the record devoid of evidence to support his assumption, there was testimony presented to the contrary (R. 1561).

The lack of conviction displayed by LTC Fagan in evaluating petitioner might be attributable to the fact that he had not functioned as a clinical psychiatrist in the preceding

two years (R. 2395). A more compelling explanation, however, is the fact that shortly after submitting his June 9th report which concluded that petitioner was unable to conform his acts to the requirements of the law, LTC Fagan became the Division Psychiatrist, rated by the Commander of the Third Armored Division, who also convened petitioner's court-martial (R. 60-61). Prior to assuming that position, but knowing of his new assignment, LTC Fagan encountered this same general officer at a social gathering (R. 84, 2414). The convening authority questioned LTC Fagan concerning the latest government sanity board findings (R. 84, 2414). When LTC Fagan told him that the second board would very likely reach the same results as the first, the convening authority conveyed his inability to accept such a position (R. 85). LTC Fagan subsequently reversed himself and joined in a later report in which he concluded that the appellant had been mentally responsible at the time of the offense (Appellate Exhibit VII).

The government's effort to prove that petitioner was mentally responsible at the time of the explosion on November 4th was hypothesized on the improbable theory that petitioner's anger could explain the course of events that evening. The court members were asked to believe, *to the exclusion of all other explanations*, that petitioner saw that his friends were in Tank A-33 at which the muzzle of Tank A-35 was aimed, spoke to two of the occupants of Tank A-33 and then out of previously undisclosed anger proceeded to discharge the main gun of Tank A-35 with full mental responsibility. The court was asked to ignore petitioner's acknowledged mental disease, the history of his bizarre and irrational behavior which continued through November 4th and his *involuntary* physical manifestations of fear and panic when describing, to the limited extent that he could, the events of November 4th (R. 2208-91, 2234, 2263).

The court members were asked to dismiss as "hocus pocus" (R. 2667) the testimony of seven highly experienced and

respected professionals, including the government's own psychiatrists, who provided cogent reasons for their unanimous conclusion that petitioner lacked the ability to conform his acts to the requirements of the law. To petitioner's great prejudice, the court obliged and disregarded the overwhelming evidence of record.

C. *The inherently suspect and unreliable deliberative process was further aggravated when the military judge erroneously instructed on matters of law concerning standards of proof regarding sanity and lesser-included offenses.*

While advising the court members on the charged offense of unpremeditated murder, the military judge incorrectly explained the offense of murder while engaged in an act inherently dangerous to others and demonstrating a wanton disregard for human life by instructing:

> For an act to be inherently dangerous to others and demonstrate a wanton disregard for human life, the act must, (a) be inherently dangerous to and show a wanton disregard for the life of more than one person; (b) be such that its probable results, *if known to the accused*, would be death or great bodily harm; and (c) be intentionally done by the accused, although death or great bodily harm does not have to be the intended result.

(R. 2710) (emphasis provided). In contrast, the language, in pertinent part, contained in the Military Judges' Guide[7] provides that the "probable results, *known to the accused*, would be death or great bodily harm." Benchbook at 4-93. After the panel had heard all of the instructions, which were by necessity extensive, and had deliberated the remainder of that day and much of the following, the senior member of the panel requested that the military judge re-instruct on the elements of unpremeditated murder (R. 2824).[8] The military judge re-

---

[7] Dept. of the Army, Military Judge's Guide (June 1971) [hereinafter cited as Benchbook].

[8] This request came after approximately seven hours of deliberation.

read his prepared instruction verbatim concerning unpremeditated murder while engaged in an inherently dangerous act (R. 2825-2827). One of the other members then asked specifically that the second element of the definition of "wanton disregard" be repeated (R. 2828). The judge complied with his request. Each time the misleading and erroneous "if" was inserted. Finally, defense counsel attempted to have the instruction corrected so as to conform with the benchbook and with the law (R. 2824). The military judge rejected the defense request and for the *fourth* time misstated the instruction (R. 2824). He instructed once again on the elements of involuntary manslaughter, but again his misstatement of the second element of "wanton disregard" obviated the critical distinction between manslaughter and murder. This was the last set of instructions the members received. Immediately thereafter, defense counsel again suggested to the military judge that his instruction left the impression that there was no knowledge requirement for the offense of murder (R. 2835, 2837). The military judge rejected the suggestion (R. 2837). Thirty minutes later the members had reached their findings. Concerning Charge I, the appellant was found guilty of two specifications of murder by an act inherently dangerous to others and envincing wanton disregard for human life (Appellate Exhibit CXIII).

It is clear from paragraph 197 of the Manual for Courts-Martial, United States, 1968, the Benchbook in effect at the time of trial and the one that has now superseded it, that knowledge of the probable consequences of the accused's act is a necessary element of the offense of murder. A number of observations indicate that the members were seriously misled by the judge's misstatement of the law. First, the discussion which immediately preceded the announcement of findings leaves no doubt that the members were confused in general about the elements of murder by an act inherently dangerous to others and specifically about the clause that the judge persisted in misstating (R. 2827-2828). Secondly, the fact that the members failed to convict petitioner of any offense under Charge II which required an element of knowledge indicates

unequivocally that the court determined that he had diminished capacity at the time of the offenses. Although charged with attempted murder, he was convicted of two specifications of the lesser offense of assault with a dangerous weapon, which required neither intent nor knowledge.

Under these circumstances the disparity between the findings of guilty of the offenses coming under Charge I and those under Charge II is significant. Had the panel members been properly instructed in accordance with the law, that they were required to find beyond reasonable doubt that appellant knew the probable consequences of his act before he could be found guilty of unpremeditated murder, they very likely would have rejected the theory in favor of a finding of manslaughter. Such a finding would have been consistent with their findings with respect to Charge II. In view of the critical role the issue of the appellant's mental responsibility played in this case and the fact that the panel evidenced their confusion over *the specific clause that was misstated*, the blurring of the distinction between murder in violation of Article 118, UCMJ, and involuntary manslaughter in violation of Article 119, UCMJ, was fatal error.

A second instructional error occurred regarding the Benchbook instruction on mental responsibility. Specifically, defense counsel objected to defining "a lack of substantial capacity" as a situation where "there is a substantial or great impairment of that capacity" (R. 1919, 2529). The military judge confused the legal standard of mental capacity by using the term "substantial" to modify both capacity and impairment. Assigning numerical values to the word "substantial" illustrates the error. If substantial mental capacity is 75% capacity, then possessing a 75% or more capacity to appreciate criminality or to conform acts to the requirements of the law vitiates the defense. However, the statement that a "lack of substantial capacity" exists when there is a "substantial" impairment of that capacity results in the converse of the legal standard and possessing a 25% or more capacity vitiates the defense. It cannot be ascertained whether the

court-martial panel determined whether petitioner possessed over 25% capacity or over 75% capacity in finding him mentally responsible.

Finally, the military judge failed to instruct upon voluntary manslaughter, a lesser included offense of unpremeditated murder (Specification 3 and 4 of Charge I) of which petitioner was found guilty. Voluntary manslaughter involves an intentional killing of another under the influence of a reasonably induced emotional disturbance (*i.e.*, passion such as fear or anger) causing a temporary loss of normal self-control. The provocation of such passion must be such as to cause a reasonable man to loose his normal self-control. Fright and terror have been recognized as intense emotions which qualify as "passion" in cases of voluntary manslaughter. *Commonwealth v. Colandro*, 231 Pa. 343, 80 A. 571 (1911); *People v. Borchers*, 50 Cal.2d 321, 325 P.2d 97 (1958).

In the case *sub judice*, petitioner "felt a very keen sense of grave danger. Danger ultimately to his life" (R. 2228-2229). Petitioner believed there was a conspiracy to kill him (R. 2232). He believed the reason he was told to enter Tank A-33, the tank which was ultimately destroyed, was so that he could be murdered (R. 2233). He believed that the soliders in Tank A-33 wanted to kill him (R. 2233-2234). Petitioner believed that two other members of his unit, who had previously died, had actually been murdered and the chain-of-command had covered it up. He believed he was the next target (R. 2235). Dr. Hubbard described petitioner's belief that he was in imminent fear for this life from the occupant's of Tank A-33 as "just as real as if [the parties to the trial determined] in a logical, reasonable fashion [that] we were imperiled. I mean he was just as convinced" (R. 2236).

This honest but erroneous belief that he was acting in self-defense was a result of the delusional system appellant was operating under. It was determined to be a belief resulting from his extreme paranoid schizophrenia (R. 1982). Besides the seven defense expert witnesses, a government rebuttal witness also admitted that petitioner suffered from paranoid

schizophrenia and was acting under delusions as a result of this disease on November 4th, the day Tank A-33 was destroyed (R. 2452-2453).

The denial of relevant instructions on findings, even if based upon an unstated conclusion that the provocation was unreasonable, is error. The modern trend in state and federal courts is to leave questions of reasonableness of a provocation to the jury.[9] Murder is reduced to manslaughter if the killer mistakenly believes that the possibility of injury to him exists, even though in fact he has not been injured. The Model Penal Code has similarly introduced the element of subjectivity in its test for voluntary manslaughter.[10] Thus, petitioner's uncontroverted subjective believe that his life was in imminent danger, which provoked his actions, raised the lesser-included offense of voluntary manslaughter, upon which the judge had a *sua sponte* duty to instruct. Petitioner was denied full consideration of his case by the military judge's failure to instruct the members upon the elements of self-defense. It is incumbent on the members, not the military judge, to determine if the defense lies. The members may have believed that petitioner's actions, out of his perceived self-defense, reduced his culpability under Specifications 3 and 4 of Charge I from unpremeditated murder to voluntary manslaughter. An "imperfect self-defense" (i.e., where the actor erroneously believes the force he employs is necessary) also establishes a

---

[9] *E.g.*, the Wisconsin Statute (Wis. Stat. Annot., 940.05) makes it manslaughter to kill in the heat of passion without any requirement that the heat of passion be reasonable.

[10] Model Penal Code § 210.3 (1982) provides that a murder is reduced to manslaughter if "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse, the reasonableness of which is to be "determined from the viewpoint of a person in the actor's situation *under the circumstances as he believes them to be*" (emphasis added). This formulation is treated on a parity with classic provocation situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event that arouses extreme mental or emotional disturbance. There is a larger element of subjectivity than existed under previous law. Model Penal Code § 210.3, Comment 3.

justification for the killing. Such homicides are at most manslaughter under the Model Penal Code, whether or nor there was an intent to kill.[11] The military judge's erroneous omission clearly communicated to court members that voluntary manslaughter was not a lesser-included offense of unpremeditated murder. And while the judge made numerous references to "legal justification and excuse" for the killing (R. 2708, 2710, 2712, 2715, 2716, 2718, 2719, 2720, 2724, 2729, 2733, 2737, 2791, 2826), he failed to advise on "self defense" although such was clearly raised by the evidence.

D. *The inherently suspect and unreliable deliberative process was further infected when one of the five panel members independently investigated the circumstances surrounding the offenses.*

During the course of petitioner's court-martial, one of the panel members, Major Randolph A. Oberlin, performed his own experiments by lining up two tanks in an attempt to simulate the exact positions of Tanks A-33 and A-35 at the time of the explosion. He then looked through the sights and the open breech to determine petitioners intent on November 4th (Defense Appellate Exhibit C). As a result of these actions, evidence going to petitioner's state of mind which was not presented at trial, was considered by at least one panel member. The deliberations of other panel members may have been influenced by this impermissible action as well. In his affidavit, MAJ Oberlin states in pertinent part, "Nor was the information used in any way to influence the other panel members" (Defense Appellate Exhibit C). It is worth noting that the juror's *ex parte* affidavit leaves unstated the extent to which MAJ Oberlin discussed his observations with other panel members. Rather, MAJ Oberlin's words reflect at most his *subjective* belief regarding the use of the information gained by his improper experiment. An unequivical state-

[11] Some modern statutes explicitly recognize imperfect self-defense and other forms of imperfect justification as a basis for reducing murder to manslaughter. *Id.*, Comment 6.

ment actually denying that he communicated his observations to the others is conspicuous by its absence.

CONCLUSION

The conviction of petitioner and his sentence presents an unacceptable example of the tragic results of allowing an inherently unreliable five-member panel to try infamous criminal charges. The panel in the case *sub judice* disregarded overwhelming evidence that petitioner was insane at the time of the offense. The deliberations were affected by external evidence juror misconduct and rendered even more ineffective by numerous errors committed by the military judge. Rather than recognizing the insidious command influence which caused the prosecution's key witness to alter his testimony, a *per se* unconstitutional jury convicted petitioner despite the overwhelming evidence that he was insane at the time of the offense.

The military's mission of defending this country is without a doubt a most compelling state interest. Petitioner's interest in receiving a fair trial resulting in accurate findings of fact is equally compelling. There has been no showing that compliance with the basic due process rights expressed in *Burch* will in anyway harm the national defense. The perception of fairness and accurate verdicts can only enhance the morale and effectiveness of men and women in our Armed Forces. Thus, the two interests are neither inconsistent nor mutually exclusive and can coexist to promote an effective fighting force while maintaining the constitutional rights of its soldiers. Anything less than a minimum requirement for unanimous six-member verdicts clearly thwarts constitutional due process and fundamental fairness. In the absence of a clear and compelling national interest requiring otherwise, soldiers are entitled to the same accuracy from fact-finders in criminal trials as are all other citizens of the United States.

Respectfully Submitted,

MARION E. WINTER
Major, JAGC
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
Nassif Building
Falls Church, Virginia 22041
(703) 756-0569
Counsel of Record

CHARLES A. ZIMMERMAN
Lieutenant Colonel, JAGC
Appellate Defense Counsel

WILLIAM J. KILGALLIN
Captain, JAGC
Appellate Defense Counsel

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 51,774
CM 443107

UNITED STATES OF AMERICA, RESPONDENT

v.

MILTON E. HARGROVE,
SPECIALIST FIVE, UNITED STATES ARMY, PETITIONER

September 25, 1987

Counsel

For Appellant: *Captain William J. Kilgallin* (argued); *Colonel Brooks B. LaGrua, Lieutenant Colonel Arthur L. Hunt, Major Marion E. Winter, Captain Pamela O. Barron* (on brief); *Lieutenant Colonel Paul J. Luedtke* and *Captain Rita R. Carroll.*

For Appellee: *Captain Denise K. Vowell* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Joseph A. Rehyansky, Captain Howard G. Cooley* (on brief); *Colonel Norman G. Cooper, Lieutenant Colonel Gary F. Roberson, Captain Dean C. Berry.*

Opinion of the Court

COX, Judge:

Appellant was tried by general court-martial with members and found guilty[1] of two specifications of murder by com-

---

[1] Appellant was also charged with two specifications of premeditated murder and two specifications of attempted unpremeditated murder. No

mitting "an act inherently dangerous to others" and two specifications of aggravated assault, in violation of Article 118 (3) and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 918(3) and 928, respectively. He was sentenced to be confined for 20 years, dishonorably discharged from the service, and reduced in grade to E-1. The findings and sentence were approved by the convening authority, and the Court of Military Review affirmed in an unpublished opinion.

We granted review of the following issues:

I

WHETHER, TO APPELLANT'S PREJUDICE, THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE COURT MEMBERS REGARDING CRITICAL ASPECTS OF THE LAW.

II

WHETHER AS THE RESULT OF THE IMPROPER ACTIONS OF ONE OF THE PANEL MEMBERS IN INDEPENDENTLY INVESTIGATING THE CIRCUMSTANCES SURROUNDING THE OFFENSES, THE FINDINGS OF GUILTY WERE BASED UPON MATTERS NOT ADMITTED INTO EVIDENCE AT APPELLANT'S TRIAL.

Issue I

A. ***Definition of wanton disregard for human life.***

Appellant's conviction was based on evidence which established that, while he was inside an M-60A3 tank, he fired a sabot round from the main gun of the tank into another tank, causing two soldiers to be killed and two others to be seriously injured. His conviction of murder was predicated on

---

findings were returned as to these offenses. We believe the better practice would be to make specific dispostions as to all offenses charged.

a finding that the committed "an act inherently dangerous to others and evincing a wanton disregard for human life."

The question of appellant's sanity was litigated extensively at trial. The military judge, in his instructions to the court members, defined what type action would support a finding of guilty for the offense of murder under Article 118(3), as follows:

> For an act to be inherently dangerous to others and demonstrate a wanton disregard for human life, the act must (a) be inherently dangerous to, and show a wanton disregard for, the life of more than one person; (b) be such that its probable results, *if* known to the accused, would be death or great bodily harm; and (c) be intentionally done by the accused, although death or great bodily harm does not have to be the intended result; and (d) demonstrate a total disregard for the known probable results of death or great bodily harm.

(Emphasis added.) Defense counsel made no objection to this instruction. Later, when the military judge used the same text to reinstruct the court members, defense counsel observed that the word "if" had been added, but he did not specifically assert that the instruction was thereby made erroneous.

Appellant asserts on appeal that the addition of the word "if" to the instruction would permit a finding of guilty of the offense of unpremeditated murder without proof of knowledge of the probable results of the perpetrated act. Therefore, the instructions blurred the distinction between unpremeditated murder and manslaughter. *See United States v. Stokes*, 6 U.S.C.M.A. 65, 19 C.M.R. 191 (1955). We disagree.

The military judge specificially instructed the members that apellant's act must "demonstrate a total disregard for the *known* probable results of death or great bodily harm." (Emphasis added.) Therefore, the knowledge requirement was clearly set forth in the instruction. When read in context and *in toto*, it is apparent that the military judge used the

word "if" to imply that an accused must know the probable consequences of his actions.

Furthermore, trial defense counsel did not object to the instruction, and his failure to do so constitutes waiver absent plain error. *United States v. Yanke*, 23 M.J. 144 (C.M.A. 1987); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).

B. *Legal standard regarding insanity.*

Appellant's second contention is that the instructions on insanity were improper. The instructions were initially discussed during an *in camera*[2] session. The proposed instruction included a definition of the standard for sanity set forth in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). Additionally, the judge proposed to define what the term "substantial . . . impairment" meant, as follows: "A lack of substantial mental capacity exists when there is a substantial or great impairment of that capacity, but a complete impairment is not required." Trial defense counsel objected to this language, stating that, under the applicable standard in *Frederick*, appellant could not be found guilty if he lacked substantial capacity. The defense contended that the word "substantial" required a quantity more than 50 percent of total capacity. Counsel reasoned that using the same word to define a degree of impairment would require impairment in excess of 50 percent. Thus, while one part of the instruction required a finding of substantial capacity, the other part of the instruction required a finding of substantial impairment. Counsel argued that, in effect, the two parts of the instructions were mathematically inconsistent under the *Frederick* standard because an impairment could be less than substantial, but still be enough to preclude a finding of substantal capacity.

Because of the use of negative implications of the prefixes, adverbs, adjectives, and nouns used in the test, the argument of defense counsel has appeal at first blush. Indeed, the military judge initially agreed not to use this definition. However, as the testimony of the witnesses on the sanity issue unfolded, he changed his mind, finding that defense

[2] Art. 39(a), Uniform Code of Military Justice, 10 U.S.C. § 839(a).

counsel had cross-examined the witnesses in a manner consistent with his proposed instruction. Close examination of the instruction demonstrates that the judge was correct.

In *United States v. Frederick*, *supra* at 234, we adopted the test for sanity recommended by the American Law Institute (A.L.I.) as follows:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks *substantial capacity* either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(Emphasis added.) We adopted the standard because of its general acceptance by Federal courts; however, as a result of the criticism directed at the standard, it was later statutorily rejected by Congress. Art. 50a, Pub. L. No. 99-661, Div. A, Title VIII, § 802(a)(1), 100 Stat. 3905 (1986); 18 U.S.C. § 20; *see United States v. Cortes-Crespo*, 13 M.J. 420, 421 and n.2 (C.M.A. 1982). Nevertheless, here the *Frederick* standard must be met because the congressional modifications apply only prospectively. § 802(b).

We previously have rejected contentions that the words used in the quoted standard should be further defined. *United States v. Cortes-Crespo*, *supra*. Obviously, the A.L.I. standard rejected the rule that an accused's mental impairment must be complete, but it did not precisely define the degree of impairment required in terms of percentages. In the explanatory note to the standard in question, the authors observe that it "does not require a total lack of capacity, only that capacity be insubstantial." *Model Penal Code and Commentaries* § 4.01, Explanatory Note at 164 (1985 reprint).

We find that the instruction correctly stated the law as it relates to accused's mental capacity. A "lack of" capacity is that condition which exists in a person whose capacity has been "impaired." The word "substantial" modifies "capacity,"

and it has never been equated to a mathematical standard. Determining what is or is not substantial is a responsibility that rests within the purview of the factfinders. Also, appellant's argument that "insubstantial impairment" could cause a lack of substantial capacity fails to comprehend that the term "insubstantial impairment" contains a double negative. "Insubstantial" means tenous, immaterial, thin, or unsubstantial. "Impairment" means deterioration, degeneration, decline, waste, atrophy, disintegration; and damage, imperfection, disadvantage. *Roget's International Thesaurus* 1031; 544; 1016 (4th ed. 1977). Therefore, one can conclude that, taken together, "insubstantial impairment" means a slight or immaterial injury that could not rise to a level high enought to cause a lack of substantial capacity.

C. ***Presumption of sanity.***

Finally, appellate defense counsel objects to the judge's instruction on sanity, asserting that the judge, in effect, instructed that there is a presumption that people are sane. We disagree. During an out-of-court session on proposed instructions, defense counsel asserted that no instruction on the presumption of sanity should be given because the modern Federal view was that the presumption disappeared once evidence reflecting lack of sanity was introduced. The military judge indicated that he would not give an instruction on the presumption, but he did give the following instruction:

> In deciding the issue of the accused's sanity at the time of the alleged offenses, you may rely on your own common sense and your general knowledge of human nature. Therefore, *you may consider that the general experience of mankind is that most people are sane.* Of course, your focus at this junction is on the mental responsibility of the accused. Specialist Hargrove, and along with the other issues in this case [it] is for you to determine, based upon the evidence which has been presented in this court-martial, whether he was sane or mentally responsible at

the time of the alleged offenses, that is, on 4 November 1980.

The burden of proving the sanity of the accused is on the prosecution. The accused is not required to prove that he was insane at the time of the alleged offenses. If, after considering all of the evidence, as well as your common sense and general knowledge of human nature, you have a reasonable doubt as to the mental responsibility or sanity of the accused at the time of the alleged offenses, that is, on or about 4 November 1980, you must find the accused not guilty.

(Emphasis added.)

Counsel now argued, as did trial defense counsel, that the emphasized portion of the quoted instruction is, in effect, an instruction on the presumption of sanity. In *United States v. Oakley*, 11 U.S.C.M.A. 187, 29 C.M.R. 3 (1960), this Court approved an instruction containing essentially the same language used here. Judge Ferguson, in a separate concurrence, observed the following:

In sum, then, I believe it improper to advise the members of a court-martial that the accused is presumed to be sane when sufficient evidence has been introduced to raise an issue concerning his mental responsibility. *United States v. Biesak*, supra [3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954)]; *United States v. Ball*, supra [8 U.S.C.M.A. 25, 23 C.M.R. 249 (1957)]. It should be equally apparent that, should no such issue be raised, instructions on sanity are normally not required, for there is little reason to present legal principles to a jury *in vacuo*. However, the fact that the presumption is eliminated does not mean that the fact finders may not consider its predicate and conclude therefrom that evidence of irresponsibility should be rejected. In weighing evidence, a member is expected to utilize his common sense and his knowledge of human nature and of the ways of the world. Manual for Courts-Martial, United States, 1951, paragraph 74*a* (2). It may, therefore, be proper to call fairly to

> the attention of the court-martial that they may take into account the common experience of mankind in weighing the question before them. Davis v. United States, supra [160 U.S. 469 (1985)]; Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 168.

11 U.S.C.M.A at 191, 29 C.M.R. at 7. Thus, we reject appellant's contention that a reference to "common sense and . . . knowledge" is equivalent to an evidentiary presumption. Issue I is resolved against appellant.

Issue II

The second issue was initially raised before the Court of Military Review in an affidavit executed by a member of the court-martial and submitted to the court which stated:

> During the course of the court-martial of SP5 Hargrove, in October 1981, I Randolph A. Oberlin, MAJ, USA did use two tanks to simulate the positions of the vehicles on the night of the incident. This occurred in my unit's tank park but I cannot recall the specific date. At the time I was the executive officer of the 2d Battalion, 33d Armor. I used my tank and another tank from the Headquarters Tank Section. My purpose was to verify what part, if anything of the rear tank could be seen by looking through the sights and/or range finder of forward vehicle with the gun in travel lock. I also looked through the open breech of the main gun with the muzzle cover on. As I supposed, the vehicle in the rear could not be seen. I did not discuss what or why I was doing this with any of the tank crewmen involved and they were not present with me inside the turret when I was looking through the sights. I was attempting to gain some insight into what may have been Hargrove's intent on that night. The result of my efforts were inconclusive. Information gained as a result of this was not a factor in my personal decision in the matter of guilt or innocence nor was it

used in any way to influence other panel members. As I recall, the matter of intent to kill was not relevant in the case, although, at the time of my experiment I did not know this. This is, to the best of my knowledge, what I did and why I did it. ////////////FURTHER AFFIANT SAYETH NAUGHT////////////////

s/ Randolph A. Oberlin

On the basis of the foregoing, appellant submits that he is either entitled to a new trial or a hearing on the issue of the alleged improper conduct by the court member. Both the Government and appellant agree that the conduct of the member was error but disagree as to whether a presumption of prejudice exists which would require a new hearing or whether appellant has the burden to prove prejudice. *Compare Rushen v. Spain*, 464 U.S. 114 (1983); *Smith v. Phillips*, 455 U.S. 209 (1982); *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); with *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Wolfe*, 8 U.S.C.M.A. 247, 24 C.M.R. 57 (1957); *United States v. Webb*, 8 U.S.C.M.A. 70, 23 C.M.R. 294 (1957). We need not now resolve that issue because we are convinced beyond any reasonable doubt that appellant was not prejudiced, even if we assume *arguendo* that the court member's conduct raises a rebuttable presumption of prejudice.

Furthermore, we are normally hesistant to decide this important issue based upon a court member's affidavit. *See United States v. Accordino*, 20 M.J. 102 (C.M.A. 1985); *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983). But "[i]n some cases, post-trial claims of misconduct by court-martial members can be satisfactorily resolved on the basis of affidavits." 16 M.J. at 255 (Everett, C.J., concurring in the result).

Importantly, the court member's affidavits clearly acknowledges his acts and his purpose and affirmatively states that the out-of-court experiment did not influence his vote. Normally, these self-serving types of affidavits may not suffice. Here, however, appellant was charged with pre-

meditated murder and attempted murder, both charges requiring proof of the specific intent to kill. He was found guilty of the lesser offenses of murder resulting from an "inherently dangerous act" and of aggravated assault. The real issue before the members was whether the accused was mentally responsible for the offense and not whether the round was fired accidentally or intentionally. Additionally, we observe that the other court members apparently had some experience relative to the operation of tank vehicles, so it would appear that the operational capabilities of the tank in question were, at least to some extent, already known by the court members. We conclude beyond any reasonable doubt appellant has not been prejudiced.

The decision of the United States Army Court of Military Review is affirmed.

Judge SULLIVAN concurs.

EVERETT, Chief Judge (concurring in part and dissenting in part O:

Although the evidentiary experiment performed by one of the court-martial members was improper, I agree that appellant was not prejudiced thereby. (Issue II.)

However, I dissent from the majority opinion's approval of the military judge's instructions. (Issue I.) Hargrove was found guilty of murdering two other soldiers by firing a round from a gun of one tank into another tank parked in line about ten feet away, this being "an act which is inherently dangerous to others and evinces a wanton disregard of human life." *See* Art. 118(3), Uniform Code of Military Justice, 10 U.S.C. § 918(3). The military judge instructed that, as one of four conditions "[f]or an act to be inherently dangerous to others," the act must "be such that its probable results, *if known to the accused*, would be death or great bodily harm." (Emphasis added.) After deliberating the remainder of the day and much of the following day, the members returned to ask that certain instructions be repeated. In fact, one member specifically requested that the explanation of "wanton disregard" be repeated. Twice more, the military judge gave the quoted instruction.

At this point, defense counsel objected that the word "if" had been incorrectly inserted; and he asked for an instruction without that word. This request simply was for an instruction in conformance with the model instruction which is now on page 3-172 of the Military Judge's Benchbook that the lethal act must "be such that its probable results, *known to the accused*, would be death or great bodily harm." (Emphasis added.) However, the military judge repeated a fourth time the instruction which included the word "if."

Appellant now asserts that the instruction with this word inserted implied that no actual knowledge of the probable results was required of the accused. Thus, the difference between murder and involuntary manslaughter was obscured. I am not enough of a grammarian to know what use of "if" would have suggested to the court members. I cannot under-

stand why the judge insisted on retaining the word in the face of defense counsel's objection and in light of the court members' obvious desire to obtain a precise understanding of the meaning of the term "wanton disregard." On balance, I cannot say that the instruction as given is so confusing as to merit reversal; but I believe that the military judge should have instructed as requested by the defense.

The military judge proposed to give preliminary instructions to the members that "lack of substantial capacity exists when there is *a substantial or great impairment of that capacity*, but a complete impairment is not required." (Emphasis added). This instruction conformed to the model now suggested on page 6-4 of the *Military Judges' Benchbook* (May 1982). Defense counsel objected to the instruction. He explained that, assuming for purposes of argument that "substantial" means 75%, then "lack of substantial capacity" would mean that the accused would have 74% or less capacity. On the other hand, if again it is assumed that "substantial" means 75%, then "substantial or great impairment of that capacity" would require that the impairment be 75% or greater. Counsel argued that the latter actually is the inverse of the former, correct standard. Thus, under the correct standard, an accused with 74% capacity would not have the requisite capacity, while under the incorrect one he would. In response, the military judge proposed language that "[t]he legal, criteria is a lack of substantial capacity. A complete impairment is not required." Defense counsel agreed to this, and the military judge preliminarily instructed in this manner.

When it came time for final instructions, the military judge reversed himself. He offered two reasons for doing so: "One, I think the legal ambiguity pointed to by the defense counsel is, as I said, well recognized in the law. I don't think it's unique to the instructions which I propose." Second, he pointed out that defense counsel's questioning of his expert witnesses had been concerned with substantial impairment – which counsel had urged was the incorrect standard – and not

with "lack of substantial capacity" – which counsel had urged was the correct test. After expressing concern over defense counsel's tactics in arguing that the standard used in the model instruction was incorrect and then "rather meticulously . . . questioning" his witnesses along the lines of that standard, the military judge concluded, "[I]f there is any undue emphasis on this standard, it originated not with the court, but with the defense, which . . . made this subject the focus of rather pointed questioning." Thereafter, the military judge instructed as he had originally proposed to do.

Under one interpretation the two standards are different. Moreover, I agree that the standard requested by the defense – rather than that found in the Benchbook – conforms to the American Law Institute's criteria for mental responsibility which were adopted by this Court in *United States v. Frederick*, 3 M.J. 230, 234 (C.M.A. 1977). Therefore, the focus must be on the reasons for the judge's change of position.

As to the judge's first justification, I cannot understand why his recognition of "the legal ambiguity" justifies his denial of the defense's requested clarification. The judge's primary reason for changing his instruction was probably his concern that counsel had trapped him by successfully arguing that the Benchbook's model instruction was incorrect and then examining his witnesses in terms of the allegedly incorrect standard embodied in that instruction. The remedy, however, was for trial counsel or the judge to seek clarification from the witnesses while they were being questioned, rather than for the judge later to compound confusion in instructing the members.

Whatever his reason for initially agreeing to change the instruction, the fact is that the error in the model instruction was timely brought to this judge's attention and was well-illustrated by a hypothetical. The judge had the sole responsibility for rendering correct instructions, but he failed to do so.

Usually, I would be reluctant to reverse for an instructional error like this. However, in light of the evidence in this case and the court members' obvious concern about Hargrove's mental state at the time of the incident, I conclude that appellant was prejudiced and that a rehearing should be granted so that his mental responsibility can be determined under proper instructions.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 443107

UNITED STATES, APPELLEE

v.

SECIALIST FIVE MILTON E. HARGROVE, 246-90-7361, UNITED STATES ARMY, APPELLANT

3d Armored Division

C. C. WATKINS, Military Judge

Captain Rita R. Carroll, JAGC, argued the cause for the appellant. With her on the brief were Colonel R. Rex Brookshire, II, JAGC, Lieutenant Colonel Paul J. Luedtke, JAGC, and Captain Peter L. Yee, JAGC.

Captain John J. Park, Jr, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel John T. Edwards, JAGC, Major Joseph A. Rehyansky, JAGC, Captain Samuel J. Robb, JAGC, and Captain Kurt J. Fischer, JAGC.

---

27 December 1984

MEMORANDUM OPINION

Before: SU-BROWN, YAWN and WALCZAK Appellate Military Judges

WALCZAK, Judge:

Contrary to his pleas, appellant was convicted by a general court-martial composed of officer members of the murder of two soldiers and aggravated assault on two other soldiers in

violation of Articles 118 and 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918 and 928 (1976). He was sentenced to a dishonorable discharge, confinement at hard labor for 20 years, and reduction to the grade of Private E-1. The convening authority approved the sentence.

Two of the several errors assigned on appeal concern appellant's sanity at the time of the offenses and the propriety of the military judge's denial of appellant's motion to dismiss the charges because of lack of speedy trial and, specifically, his charging the defense with the time consumed in conducting a second sanity board.

Appellant joined his unit in the Federal Republic of Germany on 28 July 1980. In October 1980, he participated in a field training exercise. Upon completion of the exercise on 4 November 1980, appellant's tank platoon prepared its tanks for loading at the railhead in Parsberg, Federal Republic of Germany. Appellant was the driver of tank A-35. Tank A-35 was in the "travel lock" position with its turret and main gun turned to the rear. Tank A-33 was parked immediately behind tank A-35 in a column. The loading was scheduled to start early the following morning, and all the members of the platoon were to spend the night in their tanks. Appellant and Sergeant First Class (SFC) Menchaca were the only ones in A-35, whose heater was not working. Since the night was particularly cold, the company commander told his subordiantes to get their people into tanks with heaters. Accordingly, Staff Sergeant (SSG) Abell, the tank commander of A-35, directed appellant and SFC Menchaca to find a heated tank. Appellant resisted the order and only reluctantly left the tank, which SSG Abell then locked. Shortly thereafter, appellant requested the key to tank A-35 from SSG Abell so he could get some equipment he had left in A-35. When appellant failed to return with the key, SSG Abell went to check on him. He found that appellant had locked himself inside A-35. Staff Sergeant (SSG) Brooks then went to tank A-35 to get appellant out. He used a hammer to open the periscope latch. After being ordered to exit from the tank several

times, appellant finally climbed out of the tank. Staff Sergeant Brooks was accompanying the appellant back to the platoon area when they encountered the officer-in-charge at the railhead. Brooks explained that appellant insisted on remaining in his unheated tank. The officer-in-charge decided to let appellant stay in the tank. Appellant was given the key to tank A-35 and departed in its direction. Shortly thereafter, an explosion occurred, caused by a projectile fired from tank A-35. Tank A-33 burst into flames. Two of the four occupants of the tank were severely burned. Two died instantly.

Appellant contends that the evidence is insufficient to prove beyond a reasonable doubt that he was sane when he fired the main gun of tank A-35 into tank A-33. Appellant argues that a sharp deterioration in his mental condition began shortly after his arrival in Germany and continued until 4 November 1980 and shows that he suffered from a mental disease or defect. Appellant's sanity was thoroughly litigated at trial. Defense presented the testimony of seven psychiatrists who, in general, opined that appellant was suffering from a mental disease, namely paranoid schizophernia, at the time of the offense. These experts differed as to whether appellant, as a result of the mental disease, lacked substantial capacity either to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, but all agreed that appellant was mentally irresponsible under one of these two tests. *See United States v. Frederick*, 3 M.J. 230 (CMA 1977). The Government, on the other hand, called two psychiatrists who examined appellant during a sanity board[1] and later during confinement. One opined that appellant, on 4 November 1980, was suffering from a mental disease, the other described appellant's condition on the day in question as a "borderline" mental condition. Both experts agreed that appellant had sufficient capacity to conform his conduct to the requirements of the law and to appreciate the criminality of his conduct. Additionally, the prosecution relied upon the testimony of numerous witnesses who observed appellant during the period prior to, at the time of,

[1] Appellant appeared before two sanity boards.

and after the tragic events of 4 November 1980, to establish that appellant was sane and criminally responsible for his actions.

After carefully considering these conflicting opinions, we find appellant's mental responsibility was proven beyond a reasonable doubt. In reaching this finding, we have evaluated and weighed each expert's training and experience, the time each expert spent evaluating appellant, the length of time elapsed from the date of the offense to the date of examination, the extent of personality background materials used by the expert regarding the circumstances of the offense, and the evidence presented about the circumstances of the case. *See United States v. Carey*, 11 U.S.C.M.A. 443, 29 C.M.R. 259 (1960). The evidence shows that, while appellant may have been suffering from a mental disease or defect on 4 November 1980, he was capable of appreciating the criminality of his conduct and conforming his conduct to the law.

The disagreement among the medical experts can be traced to the time period in which they observed and examined appellant and the facts and documents used in their evaluation. When appellant was placed in pretrail confinement on 6 November 1980, his physical and mental condition began to deteriorate. However, when appellant was removed from pretrial confinement and placed in a hospital or a place where friends and family members would visit, his condition improved. Appellant's mental deterioration was attributed by the defense to the fact that appellant was dependent upon his environment and being close to people whom he knew. When removed from the environment, appellant's condition deteriorated.

Several of defense's expert witnesses rendered their medical conclusion as much as one year after the firing of tank A-35 and at times when appellant was in a greatly deteriorated condition. *This time lapse was most significant.* Lieutenant Colonel (LTC) Fagan, a military psychiatrist testifying for the Government, explained he initially thought

appellant legally insane[2] but changed his opinion because he failed to appreciate in his first evaluation the significant time lapse between the firing of the tank and the time appellant was seen in pretrial confinement. This expert maintained that appellant was suffering from a "borderline" condition on 4 November 1980 which had not yet manifested itself into a mental illness. Later, however, while in pretrial confinement, appellant's mental condition greatly deteriorated. Additionally, LTC Fagan testified that appellant, on 4 November 1980, could appreciate the criminality of his act and was able to conform his behavior to the requirements of the law. He explained that his earlier evaluation "was premised on a misconception . . . that Hargrove's condition immediately following the firing of the tank was essentially the same as the condition described in the first sanity board. What I failed to . . . appreciate when I wrote that report, that there was a significant time lapse between the time of firing of the tank and the time in which he was described as disheveled, severely regressed, and psychotic in the hospital." Lieutenant Colonel Fagan reached his final opinion after a thorough evaluation of appellant's military personnel file, all medical records, and correspondence by appellant with his family prior to and after 4 November 1980, and after personally inspecting tank A-35 and receiving a briefing from the division's Master Gunner.

Doctor Geiser, a civilian psychiatrist, also testified for the Government and, like LTC Fagan, was a participant in appellant's two sanity boards. Doctor Geiser was appellant's attending physician in January 1981 when appellant was first hospitalized. Doctor Geiser saw appellant daily for extended periods of time. Doctor Geiser opined that appellant on 4 November 1980 was suffering from a "probable" mental

---

[2] Lieutenant Colonel Fagan was a member of the June 1981 sanity board which found that appellant suffered from a mental disease and was incapable of cooperating in his defense. He was also a member of the sanity board dated 30 July 1981 which concluded appellant suffered from a mental disease but did not lack the capacity to appreciate the criminality of his conduct or conform to the requirements of the law.

illness but that appellant did not lack the capacity to conform or appreciate the criminality of his conduct.

While the defense's expert witnesses were qualified, their opinions were based on first observing appellant, in most instances, much later in time than LTC Fagan or Doctor Geiser and, in all instances, without giving appropriate consideration to the degree to which appellant's mental condition deteriorated in confinement. Moreover, none of the witnesses had all the data which was before the second sanity board.

The second appellate issue is closely related to the question of appellant's sanity. It is whether appellant was denied a speedy trial and, more specifically, whether the military judge was correct in charging as defense delay the time consumed in conducting the second sanity board.

All parties to the trial stipulated to certain facts relating to this issue.

DATE	DAY	EVENT
4 NOV 80	0	Alleged incident occurred at approximately 2320 hours.
6 NOV 80	1	Accused suspected, taken into custody at approximately 1800 hours, Butzbach Military Police Station.
8 NOV 80	3	Charges preferred, accused transferred to Mannheim Confinement Facility. Charges forwarded to Battalion Commander.
10 NOV 80	5	Battalion Commander forwarded charges to Brigade Commander. Brigade Commander appointed Article 32 Investigating Officer.
14 NOV 80	9	Investigating Officer tentatively scheduled hearing for 21 November 1980.

DATE	DAY	EVENT
17 NOV 80	12	Investigating Officer traveled to Mannheim, initial rights warning to accused. Defense submits request for Sanity Board. Prosecution joined in the request.
21 NOV 80	16	Original date set for Article 32 hearing.
25 NOV 80	20	Investigating Officer tentatively set 2 December 1980 as Article 32 hearing date.
1 DEC 80	26	Investigating Officer received request for Sanity Board, postponed Article 32 hearing.
2 DEC 80	27	Date previously set aside as hearing date.
9 DEC 80	34	Meeting of all four counsel (2 TC, 2 DC) with 3d Armored Division Staff Judge Advocate (SJA). Deposition of witness Menchaca.
10 DEC 80	35	Sanity Board request indorsed by SJA Office.
29 DEC 80	54	Sanity board having been appointed, government request to Mannhein Confinement Facility to release accused for psychiatric evaluation.
5 JAN 81	61	Accused admitted to 97th General Hospital. Captain Frank Smith administers psychological tests.
6 JAN 81	62	Sanity Board COL Leppla, Dr. Geiser, MAJ Hunter meets with accused. Unanimous finding that accused suffers major mental illness and incapable of cooperating in his own defense.

DATE	DAY	EVENT
8 JAN 81	64	Accused returned to Mannheim Confinement Facility pending resolution of his status.
13 JAN 81	69	Sanity Board report written in final.
15 JAN 81	71	Accused readmitted to 97th General Hospital.
16 JAN 81	72	Accused evaluated by staff psychiatrist, Dr. Geiser.
16-27 JAN 81	83	Treatment of accused by Dr. Geiser.
27 JAN 81	83	Captain Frank Smith administered psychological tests to accused.
28 JAN 81	84	Sanity Board COL Leppla, MAJ Howard, MAJ Hunter met with accused.
4 FEB 81	91	Sanity Board writes report. Accused returned to Mannheim Confinement Facility.
6 FEB 81	93	Defense counsel, GCM Convening Authority, trial counsel, and SJA receive Sanity Board report.
11 FEB 81	98	GCM Convening Authority requests clarification of Sanity Board findings.
13 FEB 81	100	Investigating Officer sets hearing date – 24 FEB 81.
18 FEB 81	105	Sanity Board president responds to GCM Convening Authority request for clarification.
25 FEB 81	112	Article 32 hearing conducted.
25 FEB 81	112	Four counsel (2 TC, 2 DC) meet again with SJA to discuss three alternatives: Dismiss charges, proceed to trial, request 2d Sanity Board. Defense counsel stated

DATE	DAY	EVENT
		that charges should be dismissed based on Sanity Board findings. When asked if defense wanted to request a second board, defense counsel said no.
25-28 FEB 81	115	Article 32 verbatim transcript prepared.
1-3 MAR 81	119	Investigating Officer prepares report. Typed final, forwarded to appointing officer–3d Brigade Commander.
4-5 MAR 81	119	3d Brigade Commander reviewed report, forwards to Butzbach Legal Center.
5 MAR 81	120	Received Butzbach Legal Center, trial fact sheet prepared.
10 MAR 81	125	Fact sheet typed final, forwarded to SJA.
12 MAR 81	127	File received at SJA Office.
13 MAR 81	128	Pretrial advice drafted by Chief, Criminal Law.
14-16 MAR 81	131	SJA reviews file and drafts advice.
17 MAR 81	132	Pretrial advice typed final. Charges referred to General Court-Martial. Request for Sanity Board forwarded to Commander 97th General Hospital.
19 MAR 81	134	Defense requested background check of accused by C.I.D. no delay requested.
7 APR 81	153	SJA forwards to defense counsel and trial counsel copies of accused personnel file obtained from Fort Benjamin Harrison.

DATE	DAY	EVENT
9 APR 81	155	Commander, 7th Medical Command, appointed Sanity Board. COL Bell, 2d General Hospital at Landstuhl, LTC Fagan, 97th General Hospital, Frankfurt, Mr. Geiser, 97th General Hospital, Frankfurt, Mr. Geiser, 97th General Hospital, Frankfurt.
23 APR 81	169	SJA sends to trial counsel and trial defense counsel the results of the requested C.I.D. background investigation of the accused.
6 MAY 81	182	Sanity Board convenes at Landstuhl, FRG, with accused.
17-23 MAY 81	199	Dr. Fagan TDY – Medical Surgical Conference at Munich, Federal Republic of Germany
27 MAY 81	203	SJA notified trial counsel that LTC Fagan wanted to see tank. Trial counsel discussed meeting date with defense counsel.
1 JUN 81	208	Trial Counsel and defense counsel meet with LTC Fagan in morning in Friedberg to view tank.
4 JUN 81	211	Dr. Geiser mails his report to Dr. Bell.
1-5 JUN 81	212	LTC Fagan TDY: Combat Psychiatry Course at Ramstein Air Force Base, FRG. Departed TDY afternoon 1 JUN 81.
8 JUN 81	215	LTC Fagan meets with defense counsel and defense psychiatrist/consultant – Dr. Roulfs.
9 JUN 81	216	LTC Fagan mails his report to Dr. Bell.
23 JUN 81	230	Dr. Bell issues a Sanity Board report.

DATE	DAY	EVENT
26 JUN 81	233	Trial counsel discussed with defense counsel possible trial date (39a session) of 8 June 81 at Drake Kaserne with military judge.
28 JUN 81	235	Trial counsel set trial date/39a session for 13 July 18 at Butzbach, FRG. Defense requested delay.
8 JUL 81	245	Date previously discussed as trial date/39a session.
13 JUL 81	250	Previously scheduled 39a session.
16 JUL 81	253	Dr. Geiser first aware of 23 June Sanity Board report issued by Dr. Bell.
20 JUL 81	257	Dr. Geiser wrote to Dr. Bell requesting that Sanity Board reconvene.
27 JUL 81	264	Dr. Geiser called Dr. Bell requesting that Sanity Board reconvene. LTC Fagan and Dr. Geiser meet, discuss accused.
29 JUL 81	266	LTC Fagan meets with Dr. Bell at Landstuhl to discuss findings of Dr. Geiser and Dr. Fagan.
30 JUL 81	267	Dr. Bell issues a Sanity Board report.
8 SEP 81	307	39a hearing at Abrams Building.
9 SEP 81	308	39a hearing at Abrams Building. Trial set for 13 October 1981.
5 OCT 81	333	39a hearing at Drake Kaserne.

At trial, the military judge held, after reviewing all the evidence, that the second sanity was not obtained exclusively for the benefit of the Government. No further explanation was given.

Appellant was in pretrial confinement for 307 days prior to appearing at an Article 39(a) session; thus, there is a rebuttable presumption that he was denied a speedy trial. *United States v. Burton,* 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971). While appellant asserts that the *Burton* standard applies, the Government contends that *Burton* does not apply since it is accountable for less than 90 days of the total 307 days. In the alternative, the Government argues that, if *Burton* applies, sufficient "extraordinary circumstances" exist which justify the delay.

As to the first sanity board, the defense at trial accepted as defense delay the 37 days from the appointment of the board, 29 December 1980, to receipt of the board's report, 6 February 1981. Disputed are fifty-four days comprised of the time from the defense's request, 17 November 1980, to the appointment of that board, 29 December 1980, and the time period spent clarifying that report, 6-18 February 1981. Appellant argues that the Government was unduly slow in appointing the board and that the board's findings did not need to be clarified since the conclusions were clear. We find under *United States v. Colon-Angueira,* 16 M.J. 20 (CMA 1983), appellant is accountable for the entire period from the time he requested the board to the time the sanity board's findings were clarified. *See United States v. Jones,* 6 M.J. 770 (ACMR 1978), *pet. denied,* 7 M.J. 38 (CMA 1979). The Government was diligent in processing the defense request for a sanity board. Moreover, the convening authority properly sought clarification of the board's findings. The board concluded that appellant suffered from a mental disease or defect on 4 November 1980, and as a result, lacked the substantial capacity both to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. The board also concluded that appellant, on 4 November 1980, did not lack the substantial capacity to form the intent necessary to commit premeditated murder, to form the degree of willfulness necessary to commit premeditated murder, or to premeditate a design to kill. These conclusions are confusing

at best. Since the convening authority and Government are responsible for assuring the mental competence and responsibility of criminal defendants, the Government would have been remiss if it had failed to seek clarification. Under these circumstances the delay is not attributable to the Government. *Jones, supra* at 772.

Turning to the second sanity board, we do not consider the period from 17 March 1981, request for second sanity board, to 30 July 1981, the board's report – a total of 135 days – chargeable against the Government. *See United States v. McClain*, 1 M.J. 60 (CMA 1975). In response to the convening authority's request for clarification, the first sanity board adhered to its original conclusions and attempted to explain how appellant possessed sufficient cognitive organization to plan and complete the criminal act of premeditated murder but lacked substantial capacity to conform or adhere to the requirements of the law because of a mental disease or defect. The board's findings were still confusing and a second sanity board was necessary. Appellant also attacks the delay involved in appointing and completing the second sanity board. Where a reasonable doubt concerning an accused's sanity exists, an arbitrary application of speedy trial rules would be wrong since the willingness of responsible officials to inquire fully into the issue may be lessened; equally undesirable would be measures that impose time limitations on medical personnel which may interfere with their inquiry. *See United States v. Badger*, 7 M.J. 838, 840 (ACMR), *pet. denied*, 7 M.J. 392 (CMA 1979). Considering the actions of the second board in reviewing medical records, the geographical location of the respective board members, their heavy caseload, the complex facts of this case and the constantly changing disposition of appellant, we find the second board was not dilatory. After subtracting the days which, as we discussed above, are not chargeable to the Government, we find the Government's accountability is less than ninety days; thus *Burton* does not apply.

Assuming, *arguendo*, that *Burton* is applicable, we find "extraordinary circumstances" existed that justified the delay in

trying appellant's case. The offenses, arising in a foreign country, involved complex facts and extensive medical-legal issues. Nine psychiatrists plus numerous other medical personnel participated in this case. Because of these "extraordinary circumstances," more than the normal processing was required to determine appellant's sanity on 4 November 1980. *See United States v. Henderson,* 1 M.J. 421 (CMA 1976). We note that some instances of delay occurred because appellant was unwilling to speak with the psychiatrists or his counsel. Additionally, this case presented some logistical problems since witnesses who were residing in the United States, including a victim of the shooting who had been hospitalized in the States, had to coordinate their return to Germany for the investigation and trial.

Since *Burton* is inapplicable to this case, we also consider whether appellant has a claim for relief under *Barker v. Wingo,* 407 U.S. 514 (1972). Appellant made no demand for trial and did not suffer any prejudice because of the delay; consequently, we find appellant's request for dismissal because of a lack of a speedy trial fails under *Barker.*

Appellant also challenges the qualification of Major General Thurman E. Anderson, the General Court-Martial Convening Authority, to review and act on his court-martial.[3] Appellant argues that General Anderson was disqualified from taking action as a result of speeches he gave, beginning in April 1982, to commanders and senior noncommissioned officers regarding favorable testimony in extenuation and mitigation for individuals convicted by court-martial. General Anderson reviewed and acted on the results of appellant's trial in February 1982, two months prior to the April talks. Absent evidence to the contrary, no issue has been raised concerning the validity of the convening authority's action in this case.

---

[3] In this case the offenses occurred; the charges were preferred and referred; and the trial was held all before General Anderson assumed command.

We have considered the remaining assigned errors and find them to be without merit.

The findings of guilty and the sentence are affirmed.

Senior Judge SU-BROWN and Judge YAWN concur.

FOR THE COURT:

By: WILLIAM S. FULTON, JR.
WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51774/AR
CMR Dkt. No. 443107

UNITED STATES, APPELLEE

v.

MILTON E. HARGROVE, (246-90-7361), APPELLANT

ORDER

On consideration of appellant's petition for reconsideration of this Court's decision (25 M.J. 68), it is by the Court this 1st day of April, 1988

ORDERED:

That said petition is denied.

EVERETT, Chief Judge (dissenting)

I dissent from denial of the petition for reconsideration.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (KILGALLIN)
Appellate Government Counsel (FORRESTER)

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51774/AR
CMR Dkt. No. 443107

UNITED STATES, APPELLEE

v.

MILTON E. HARGROVE, (246-90-7361), APPELLANT

ORDER

On consideration of appellant's motion to file out of time a petition for reconsideration, it is, by the Court, this 24th day of May, 1988,

ORDERED:

That said motion is hereby denied.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (KILGALLIN)
Appellate Government Counsel (FORRESTER)

APPENDIX E

DEPARTMENT OF THE ARMY
United States Army Judiciary
Third Judicial Circuit
Fort Leavenworth, Kansas 66027-5060

PSYCHIATRIC TREATMENT HEARING

re

MILTON E. HARGROVE
PRIVATE (E-1), 246-90-7301
UNITED STATES DISCIPLINARY BARRACKS
FORT LEAVENWORTH, KANSAS

FINDINGS AND RECOMMENDATION

BACKGROUND

On 21 November 1981, Private Milton E. Hargrove was convicted on two counts of unpremeditated murder (murder while engaging in an act inherently dangerous to others) in violation of Article 118 and two counts of aggravated assault in violation of Article 128, Uniformed Code of Military Justice. The conviction resulted from Private Hargrove's act of firing a live round of ammunition from the main gun of a tank which penetrated a second parked tank occupied by several soldiers at Persberg, Federal Republic of Germany on 4 November 1980.

QUESTION PRESENTED

On 17 February 1987, the Commander, U.S. Army Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas directed that an administrative hearing be conducted to determine whether Private Hargrove should be transferred to the custody of the Attorney General of the

United States for care and treatment in a suitable federal medical facility.

HEARING

An administrative hearing was conducted on 5 and 13 March 1987 at Fort Leavenworth, Kansas. The 160 page verbatim record of the proceeding, together with government and respondent's exhibits, is hereby incorporated by reference.

FINDINGS OF FACT

Based upon the administrative hearing record I find the following by a preponderance of the evidence:

(1) Private Hargrove has been confined in a one-man cell in the maximum security area of the United States Disciplinary Barracks (hereafter USDB) for over a year. At times he has covered the air vents of his cell because he believed certain individuals in other parts of the prison were using the air circulation system to verbally harass him. There is no basis in fact for his belief. Private Hargrove has complained that prison officials were placing harmful substances in his food; he also said that construction workers outside the prison walls were spying on him. Again, there is no basis for these beliefs. Private Hargrove believes there are individuals plotting to harass and threaten him and he has heard rumors from unspecified sources that he will be placed on death row at the USDB and he is in fear of such action. There is no evidence of any jail house plot and, of course, he can not be placed on death row. Further, Private Hargrove adamantly claims he does not need medication or medical treatment. He has refused medication and further medical examinations offered by medical personnel since at least January, 1986. At this hearing Private Hargrove was given numerous opportunities to express himself. At times he displayed a looseness of association and during the testimony of several witnesses he inappropriately chuckled and laughed.

(2) On 29 May 1986, a sanity board was convened for a medical evaluation of Private Hargrove. The board consisted of three physicians, two of which are board certified psychiatrists. Private Hargrove was given an opportunity to appear before the board; he refused. Based on various past medical evaluations, health records and personal observations by one board member, the sanity board concluded that Private Hargrove suffers from schizophrenia, paranoid type. The sanity board unanimously agreed that Private Hargrove needs intensive inpatient psychiatric treatment.

(3) Colonel (Doctor) John L. Strefling, Chief of Psychiatry, Directorate of Mental Health, USDB has observed and conversed with Private Hargrove on numerous occasions since 31 January 1986. Doctor Strefling believes Private Hargrove is suffering from schizophrenia, paranoid type, with severe impairment. He also believes the inmate's mental condition has gradually deteriorated to the point where he has become considerably withdrawn. He believes the inmate needs inpatient psychiatric treatment.

(4) Major (Doctor) Paul Epp, Chief of Community Mental Health Services, Fort Leavenworth, Kansas has observed Private Hargrove on two occasions, once in September, 1986 and again in March, 1987. In his opinion, Private Hargrove is suffering from a serious psychiatric illness, i.e., schizophrenia, paranoid type, which has become chronic. He also believes the inmate needs inpatient psychiatric care.

(5) The USDB has one psychiatrist on staff and the facility has the capability to provide some outpatient care. There is a medical ward in the prison staffed by a medical surgical nurse and one or two medical surgical technicians. There are no psychiatric inpatient facilities or psychiatrically trained nurses or technicians at the USDB. The USDB does not have the facilities or qualified personnel to effectively treat Private Hargrove.

(6) The Federal Bureau of Prisons does have institutions suitable for treatment of mentally ill patients. The federal correctional institution at Springfield, Missouri is one such

facility. That institution has occupational therapists, activity therapists, qualified psychiatric nurses and nursing assistants as well as several psychiatrists on staff. The facility can and does provide extensive inpatient psychiatric care and treatment.

CONCLUSIONS

(1) Private Hargrove suffers from a mental disease or defect diagnosed as schizophrenia, paranoid type.

(2) Private Hargrove requires medication and extensive inpatient psychotherapy.

(3) The USDB does not have inpatient facilities or adequately trained psychiatric nurses or technicians necessary for Private Hargrove's treatment.

(4) The Federal Bureau of Prisons has adequate facilities and medically trained staffs suitable for Private Hargrove's care and treatment.

RECOMMENDATION

That Private Milton E. Hargrove be transferred as soon as possible to the custody of the Attorney General of the United States for suitable care and treatment in a federal medical facility.

/s/ E. A. GATES
E. A. GATES
Colonel, JA
Military Judge

Date: 30 March 1987

Incl
as

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/62027